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Supreme Court of the United States

October Term, 1950

No. [redacted]699

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner

v.

WILLIAM C. CHANCE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Atlantic Coast Line Railroad Company, a Virginia corporation, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in this case on January 27, 1951.

A.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, paragraph (1). The decision of the United States Court of Appeals for the Fourth Circuit was rendered on January 27, 1951.

B.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Respondent, a Negro citizen of North Carolina, purchased a round trip day coach ticket from Rocky Mount, North Carolina, to Philadelphia, Pa., and return. On the return trip he traveled by Pennsylvania Railroad from Philadelphia to Washington, D. C.; by Richmond, Fredericksburg & Potomac Railroad from Washington, D. C., to Richmond, Va.; and by Atlantic Coast Line Railroad from Richmond, Va., to Rocky Mount, N. C.

He apparently changed cars at Washington and caught a train composed of five baggage and express cars, five coaches, a diner, and five Pullman cars, arranged in that order. At Washington he was directed to the tenth car from the engine, which was the fifth and rear day coach.

The Richmond, Fredericksburg & Potomac Railroad Company no longer maintains any rules for the separation of day coach passengers by race. Petitioner, Atlantic Coast Line Railroad Company, has in force and for many, many years, certainly more than fifty, has had in force, a rule and regulation requiring separate but equal accommodations for white and colored day coach passengers, and on its trains it sets aside certain day coaches for white passengers, and

certain day coaches for colored passengers, and requires, as long as space is available in the white coaches, that white passengers seat themselves therein, and as long as space is available in the colored coaches, that colored passengers seat themselves therein.

There was ample evidence introduced showing that this rule and regulation is in accord with the custom and usage of the area through which petitioner operates. Of that fact, judicial notice might well have been taken. Some slight attack was made on this evidence by witnesses who stated they disapproved of segregation; but no attack was made on the custom and usage.

From Washington to Richmond the train was operated solely by the Richmond, Fredericksburg & Potomac Railroad Company with its locomotive and its employees. As is customary upon arrival at Richmond, the Richmond, Fredericksburg & Potomac Railroad locomotive was disconnected, and the employees of that railroad left the train. The Atlantic Coast Line locomotive was connected and the employees of that railroad took charge of the train, and from that point on it was an Atlantic Coast Line train.

The three forward day coaches, i.e., the sixth, seventh, and eighth cars, were set aside by the Atlantic Coast Line for colored passengers, and the ninth and tenth cars, i.e., the two rear day coaches, were set aside for white passengers. While the train was standing in the station at Richmond, the Atlantic Coast Line porters requested white persons who were seated in the three forward day coaches to move to the two rear day coaches, and colored passengers seated in the two rear day coaches to move forward into one of the colored coaches. Ample seats for all passengers were available, and all passengers complied with the request save respondent, William C. Chance, who told the porter that he would not

move. While the train was between Richmond and Petersburg, Va. (some twenty miles to the south of Richmond), the assistant conductor requested the respondent to move, as did also the conductor, calling the respondent's attention to the rule and regulation with which the respondent was thoroughly familiar. The respondent on each occasion declined to move because, as he stated on the witness stand, he considered that the decision of this Court in *Morgan* v. *Virginia,* 328 U. S. 373, gave him the right to remain seated where he was seated despite the rule and regulation of the carrier. There were ample seats available for the respondent in either of the two rear colored coaches. There is no question in this case of the equality of the accommodations furnished in those two coaches and in the two white coaches. The accommodations were so completely proved not only to be substantially equal, but in all respects equal, that no issue of inequality has been made in this case by the respondent.

Respondent having refused to move forward to one of the colored coaches, the conductor wired ahead to the town of Emporia, Va., the next stop south of Petersburg, and asked for policemen to meet the train. Policemen met the train, boarded it and, in the presence of the policemen, the conductor again requested respondent to move forward. Again the respondent refused, and he was escorted from the train by the policemen.

Neither the respondent, the conductor, assistant conductor, porter, or policemen engaged in any loud talking, in any unseemly conduct, and there was no "man-handling".

The conductor had not wired for a Justice of the Peace, but one was present on the station platform, and respondent was arrested on a warrant issued by that Justice of the Peace, carried to the station house, and held for a short while. On the return date of the warrant, the conductor

acting at the direction of the Atlantic Coast Line requested that the warrant be dismissed, and it was dismissed.

The respondent sued the Atlantic Coast Line for alleged breach of contract, for an alleged unlawful assault, for alleged ejectment from the train, and for alleged unlawful arrest and incarceration.

On the trial of the case the District Court charged in substance that a railroad company had the right to promulgate reasonable rules and regulations with respect to traffic over its lines, and that such rules and regulations may not be discriminatory; that if the conductor was acting to enforce a reasonable rule and regulation in a reasonable manner, such regulation being known by the respondent, and if the accommodations were equal, the conductor had a right to evict the respondent from the train upon a refusal to move, and that the conductor also had the right to call police officers to his assistance. The Court further instructed that if the warrant for the arrest of the respondent was issued on the initiative of the police officers, and not on that of the conductor, there was no liability upon the railroad for the arrest, but if it was issued at the instance of the conductor, the respondent having left the train peacefully when requested by the officers, the conductor was not justified in causing the arrest even though the rule and regulation was reasonable.

After a period it became perfectly evident that the jury could not agree upon a general verdict, whereupon specific inquiries were submitted to the jury, among others, whether the respondent was evicted from the train for violation of a rule and regulation which was known to him, and whether the rule and regulation was reasonable and was reasonably enforced by evicting the respondent. The jury answered each of these questions in the affirmative. Another question, name-

ly whether the railway caused the arrest, was submitted. The jury answered that it was unable to agree on an answer to that question.

At the conclusion of respondent's testimony and at the conclusion of all the testimony, petitioner had moved for a directed verdict, one of the grounds of the motion being that under the statutes and decisions of Virginia, i.e., Title 18, Section 208 of the Code of Virginia, *Virginia Railway and Power Company* v. *O'Flaherty,* 118 Va. 749, and *Virginia Electric and Power Company* v. *Wynne,* 149 Va. 882, the respondent was a trespasser and was guilty of a misdemeanor, to-wit, he was a disorderly person, and that accordingly the arrest was rightful, and it was immaterial whether the police officers or the conductor may have caused it.

Since the jury was hung upon the question of the arrest, petitioner stated that on that feature of the case it would stand on its motion for a directed verdict, and requested the Court to instruct the jury to ascertain the amount of damages to which respondent was entitled if the arrest were wrongful, and then to rule upon the question of the arrest on the motion for a directed verdict. This motion the Court adopted. The jury found the damages to be $50.00; the Court found the arrest to be wrongful, and entered judgment against petitioner in the amount of $50.00.

On cross appeals to the Circuit Court of Appeals that Court held the regulation to be invalid as a burden upon interstate commerce.

Upon the first cause of action before it, i.e., the appeal of the respondent from the judgment of the lower court sustaining the ejectment, the judgment of the District Court was reversed. Upon the second cause of action before it, i.e., the judgment of $50.00 against petitioner for the arrest, the Circuit Court of Appeals held that that judgment must be

set aside, and a new trial granted, since the matter was tried upon the erroneous theory that the regulation was valid and the verdict of the jury was necessarily affected thereby.

The whole matter was thus reversed and remanded to the District Court. Subsequent proceedings before the District Court upon the question of the ejectment are, of course, to be confined to the question of the amount of damages therefor, and for a complete new trial on the matter of the arrest. Hence the decision of the Circuit Court is final upon the critical point of the validity or invalidation of the segregation rule and regulation, and of the right of the petitioner to adopt and enforce such regulation.

C.

THE QUESTION PRESENTED

The question presented is whether a common carrier of passengers by rail violates the Commerce Clause of the Federal Constitution if it adopts and enforces against an interstate passenger a rule and regulation requiring that white and colored day coach passengers occupy separate coaches, equal in all respects to one another, when such rule requiring such separation is in accord with the customs, traditions and usages of the people of the territory through which the carrier operates.

D.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(1) The question presented is one of fundamental importance to common carriers not only by rail but also by bus

and steamship operating throughout a large area of the country, as well as to the people residing in that area, and of the country as a whole. In reliance upon the decision of this Court in *Hall* v. *DeCuir,* 95 U. S. 485, and *Chiles* v. *C. & O. Ry.,* 218 U. S. 71, it has heretofore been accepted that such a regulation is valid and enforceable so long as the Congress refrains from taking action in that sphere, and carriers throughout wide areas of the country have adopted and have enforced such regulations. The decision of the Court of Appeals raises a question of the validity of all such rules and regulations and it is of the utmost importance that that question be put at rest one way or the other.

(2) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of the Supreme Court, indeed actually in conflict, with the two decisions mentioned in the preceding paragraph and particularly with the latter of those two decisions.

(3) The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the District of Columbia in the case of *Washington, B. & O. Electric R. Co.* v. *Waller,* 289 F. 598.

A supporting brief accompanies this petition.

Wherefore your petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered by that Court on January 27, 1951; that its judgment be reversed; that this case be remanded to it with directions that it consider and pass upon the point raised by Atlantic Coast Line by its cross appeal to the Circuit Court of Appeals, namely, whether William C. Chance was a trespasser and was guilty of a misdemeanor under the Virginia law, and that so much of the judgment entered by the United States District Court

as held the rule and regulation to be valid and to have been reasonably and properly enforced be reinstated by this Honorable Court.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The memorandum opinion of the United States District Court for the Eastern District of Virginia and its supplemental opinion are to be found at pages 12-19, inclusive, of the Record. The opinion of the United States Court of Appeals for the Fourth Circuit is found at pages 179-186. inclusive, of the Record. *William C. Chance* v. *Lambeth and Atlantic Coast Line Railroad Company,* 186 F. 2d 879.

II.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254, paragraph (1). The judgment of the United States Court of Appeals for the Fourth Circuit to be reviewed was entered on January 27, 1951 (R. p. 187).

III.

STATEMENT OF THE CASE

A statement of the case appears under heading "B" of the petition for writ of certiorari. In the interest of brevity this statement is not here repeated, but is referred to with the request that it be considered as incorporated herein by reference.

IV.

QUESTION PRESENTED

The question specifically brought forward by the petition for a writ of certiorari appears under heading "C" of the petition. Again the statement is not here repeated in the interest of brevity, but is referred to with the request that it be considered incorporated by reference.

V.

SUMMARY OF THE ARGUMENT

A carrier not only has the right, but is under the duty, to adopt reasonable rules and regulations for the conduct of its business and for the convenience, comfort and safety of its passengers, subject of course, where interstate commerce is involved, to all valid enactments of the Congress and regula-

tions of Federal administrative bodies adopted pursuant to such enactments. In the absence of law or valid governmental regulation to the contrary, a rule or regulation is reasonable if it is in accord with the established usages, customs and traditions of the people, tends to promote their comfort and to preserve public peace and good order, and no rule and regulation which is induced by the general sentiment of the community for whom it is made and upon whom it operates can be said to be unreasonable.

The rule and regulation of the petitioner here involved, to-wit, that separate but equal accommodations shall be furnished to day coach passengers of the white race on the one hand and the colored race on the other, is a reasonable rule and regulation. Passengers aware of the rule and regulation or those to whom knowledge of it is brought are under duty to comply therewith. If they refuse so to do, they may be ejected.

There is a marked and fundamental distinction between a State statute, law or regulation requiring that separate but equal accommodations be furnished to white and colored passengers, and a rule and regulation of a carrier requiring such separation. The former when applicable to an interstate passenger has been held by this Court to be an effort by the State to regulate interstate commerce and to infringe upon the broad power conferred upon the Congress by the Commerce Clause of the Constitution, and hence to be a "burden on commerce" and unconstitutional. But so long as the Congress fails to act and to make such uniform provision for the country as a whole as it may deem to be advisable, the carrier is free to promulgate and enforce such a rule.

The broad grant of power to the Congress to regulate commerce (whether or not Congress has exercised in a particular field, the power thus given to it) renders invalid *statutes and regulations of the State* which directly impair

the facilities of interstate commerce; such actions are "burdens upon commerce" and void; but rules and regulations, reasonable in the sense heretofore indicated, adopted by a carrier for the conduct of its own business, revocable by the carrier at will, which run counter to no act of Congress or any regulation adopted pursuant thereto, in no sense impinge upon the authority of Congress to regulate commerce, are not "burdens upon commerce" and are not unconstitutional.

VI.

ARGUMENT

(a) A carrier may adopt reasonable rules and regulations.

We think it has never been denied that a carrier not only has the right but is under the duty of adopting reasonable rules and regulations for the conduct of its business and for the convenience, comfort and safety of its passengers. 9 Am. Jur. pp. 503-4; 13 C.J.S. pp. 1081-84; Fetter, Carriers of Passengers, p. 642.

The statement just made of course presupposes that the rule and regulation does not conflict with any valid statute or governmental regulation. In this case there is a complete absence of any such statute or regulation applicable to an interstate passenger by any governmental authority, Federal or State.

Any rules and regulations adopted by the carrier are subject to review by the courts upon the question whether they are reasonable or discriminatory in character. In the instant case, upon a charge that correctly set forth the law, the jury found the rule and regulation to be reasonable and to have been reasonable enforced by the ejectment of respondent (R. pp. 169-70). The District Court in its memorandum opinion held that the question of reasonableness was a matter

of law for the Court to decide; that it had erred in submitting that question to the jury; but it held as a matter of law that the rule was reasonable and therefore that the error was harmless (R. p. 18). The Circuit Court of Appeals did not hold the rule to be unreasonable, but it held that since the Congress had the power to regulate commerce (although the Congress had not acted) the rule infringed upon that power, and hence was unconstitutional.

(b) The test of reasonableness.

This Court has authoritatively determined what is the test of the reasonableness of the regulations of a carrier in *Chiles* v. *C. & O. Ry. Co.*, 218 U. S. 71. In referring to an earlier case (*Plessy* v. *Ferguson*, 163 U. S. 537), it pointed out that in that earlier case the test of reasonableness of a statute was set forth and it said:

> "It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs, and traditions of the people,' and the 'promotion of their comfort and the preservation of the public peace and good order,' *this must also be the test of the reasonableness of the regulations of a carrier,* made for like purpose and to secure like results. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable." (Italics supplied.)

So far as we are aware, this statement of the test stands today unquestioned.

(c) The rule and regulation in question is reasonable.

Certainly as early as the 1880's (Rep. tr. p. 254) and as the period around 1900 (Rep. tr. pp. 271-2, 286),

petitioner and other roads in the South had a rule and regulation requiring that white and colored passengers be seated in different coaches and that equal accommodations be furnished. In keeping with that rule, special notices are from time to time issued to trainmen, two of which are quoted in full in the opinion of the Circuit Court of Appeals (R. pp. 181-2). This rule and regulation in the field of railroading is the same as that which applies in the fields of schools, busses, street cars, churches, theaters, restaurants, etc., for in those and in many other fields the custom and practice of the people prevailing throughout the whole area in which the Coast Line operates has been that of separation or segregation (Rep. tr. pp. 254, 270, 286-287). Evidence need scarcely have been offered upon that subject, for perhaps no fact in connection with life in the Southern States and in some of the border states is more widely known, more widely discussed, and frequently more widely misunderstood and misinterpreted.

Specifically, such a regulation has been traditional with the railroads operating in Virginia and in North Carolina (see the testimony of H. Lester Hooker, a member of the State Corporation Commission of Virginia, at pages 223 *et seq.* of the reporter's transcript and that of Robert V. Self, formerly Director of Transportation of the North Carolina Utilities Commission beginning at page 232 thereof). In practice under the regulation, if the cars assigned to one race are full, members of that race are seated in cars assigned to the other race (Rep. tr. p. 279), and particularly during the years of the second World War with the crowded conditions of traffic, it became at times impossible to enforce the regulation, and this condition gave rise to a number of incidents of trouble on the Coast Line (Rep. tr. pp. 287-9).

The testimony offered by respondent in no way controverted that offered by petitioner of the custom, practice and

sentiment throughout the area. Certain individuals, members of the Negro race, social workers, C.I.O. officials (R. pp. 102, 107, 108, 114, 117, 119, 121, 123) testified to the fact that they did not approve of segregation, and on occasions in their travels had seen white persons and Negro persons occupying the same day coach without unpleasant incident. The evidence also shows that the Richmond, Fredericksburg & Potomac Railroad, which operates a short line from Washington, D. C., to Richmond, Virginia, no longer requires segregation of passengers in day coaches.

The only evidence in the Record concerning the question whether public sentiment throughout the area is that this and similar regulations are conducive to good order and safety, as well as in accordance with the custom and tradition of the area, is that of Commissioner Hooker and Mr. Self above referred to. It stands uncontradicted and comes from gentlemen whose official positions and long years of service therein have placed them in a position which enables them to testify authoritatively.

(d) The rule and regulation herein questioned does not conflict with Federal constitution, law or regulation and is valid.

The respondent raised in his pleadings, argued at length in his briefs, and briefly argued orally contentions that this rule and regulation was violative of certain sections of the 14th Amendment to the Federal Constitution. These contentions were over-ruled by the District Court and were not considered by the Court of Appeals. That Court considered only the contention, which is the main contention made by respondent in this case, that the regulation violated the Commerce Clause of the Federal Constitution, and in this brief we shall confine ourselves to that contention.

Fortunately we have certain landmarks to guide us. In 1878 there came before this Court the case of *Hall* v. *DeCuir,* 95 U. S. 485, which case has been recently followed with approval in *Morgan* v. *Virginia,* 328 U. S. 373.

In the *Hall Case* the Court had before it a statute of Louisiana which prohibited common carriers from making any discrimination between passengers on account of race or color. The State Courts construed this statute to mean that the carrier could not refuse to admit colored passengers to the privileges of cabins set aside for white passengers, and the owner of a steamboat plying the Mississippi in interstate commerce, who had a rule, regulation or enforced practice calling for separation of passengers by race, was found liable in damages for refusal to admit a colored passenger to such a cabin. There we had the State statute *prohibiting* and not requiring separation.

In reversing the State Courts, this Court held in a decision by Chief Justice Waite that every state regulation which might have a bearing on interstate commerce was not unconstitutional, nevertheless ". . . state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress", and the Louisiana statute did seek to impose such a direct burden.

The Court pointed out that if each state was at liberty to regulate the conduct of carriers within its jurisdiction great confusion would result. It held that no carrier of passengers could conduct its business with satisfaction to itself or comfort to its passengers if on one side of a State line white and colored passengers *must* be permitted to occupy the same accommodations and on the other *must* be kept separate. It held that "uniformity in the regulations" by which a carrier is to be governed from one end of its route to the other "is a necessity in his business" and that to secure it Congress is

vested with "the exclusive *legislative* power of determining what such regulations shall be."

Since Congress had failed to act, the Court had to consider that feature of the matter, and it held that Congress' power to regulate "may be exercised without legislation as well as with it", and

> "by refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution".

And further

> "* * * Congressional inaction left Benson" (the owner of the boat) "at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, * * * as seemed to him most for the interest of all concerned."

The failure of Congress to have acted and its effect upon the situation was considered at greater length by Mr. Justice Clifford in his concurring opinion. He points with approval to certain early decisions of Chief Justice Shaw to the effect that the rules of the common law are applicable to steamboats and railways, and that under the rules of the common law such carriers have authority to make such reasonable rules and regulations, and he points to many examples, both in the field of carriers and to situations of a kindred character arising in other fields.

Hence, under the law as laid down in *Hall* v. *DeCuir, supra,* since admittedly there is no Federal statute or regulation by which Congress has occupied the field, petitioner is

entitled to operate under the provisions of the common law, we assume in this case the common law as it has been declared in Virginia, which is the same as the common law as it has been declared elsewhere, to-wit, that barring some constitutional or statutory provisions to the contrary, a railroad has a right to adopt reasonable rules and regulations (see *N. & W. R. Co.* v. *Wysor,* 82 Va. 250; *Va. R. etc. Co.* v. *O'Flaherty,* 118 Va. 749). Were it otherwise, and if only Congressional legislation can determine this matter and if Congress, as is here the case, has failed to legislate, we would be in the anomalous position of having *no rule of law* applicable on a subject of this kind to the carriers.

It was not the particular provision of the Louisiana statute *prohibiting* segregation which rendered that statute unconstitutional. In *Morgan* v. *Virginia, supra,* the Court had before it the opposite side of the picture,—a State statute which *required* segregation, and that State statute was declared to be unconstitutional for the very reasons that the statute involved in *Hall* v. *DeCuir, supra,* was held to be unconstitutional, and on the authority of that earlier case.

While there is in *Morgan* v. *Va., supra,* language which might be construed as holding that the vice in the situation there presented was that passengers on a bus might be required to seat and re-seat themselves as the proportion of white and colored persons in the bus might at any time dictate, nevertheless the opinion seems to be cast on the same broad lines as that of *Hall* v. *DeCuir, supra,* and certainly it has been so construed both by Federal and State Courts (*Mathews* v. *So. Ry. System,* 157 Fed. 2d, 609; *Lee* v. *Commonwealth,* 189 Va. 890).

It may accordingly be said that under the decisions of this Court any State statute seeking to *compel* separation or to *prohibit* separation by race of interstate passengers is an

attempt to impose a direct burden upon interstate commerce, to interfere with its freedom, and is unconstitutional.

This Court has been equally positive in its declarations that, Congress having failed to act, a carrier may adopt reasonable rules and regulations governing this subject. It so declared in *Hall* v. *DeCuir, supra,* but later there came to it the case of *Chiles* v. *C. & O. R. Co.,* 218 U. S. 71, which directly presented that question. There an interstate Negro passenger traveling from Washington, D. C., to Louisville, Ky., changed trains at Ashland, Ky. The C. & O. had a separation or segregation rule similar to that of the Coast Line in the instant case. That passenger took a seat in a white coach and was required to move to a coach set aside exclusively for colored passengers. He brought suit. This Court pointed out the following:

> "... we must keep in mind that we are not dealing with the law of a state attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to-wit, the railroad company; and the distinction between state and interstate commerce we think is unimportant."

This Court then referred to *Hall* v. *DeCuir, supra,* and particularly to those portions of that decision dealing with the right of the carrier, in the absence of Congressional legislation, to adopt its own rules and regulations governing it throughout its whole route.

This Court affirmed the judgment of the Kentucky courts and held that in the absence of Congressional legislation to the contrary the railroad had a right to adopt and enforce such a rule.

We do not believe it can be said with accuracy that *Chiles* v. *C. & O., supra,* was directly affirmed in *Morgan* v. *Virginia, supra.* It certainly was not repudiated. In so far as

Supreme Court of the United States

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Misc. No. 699

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v.

WILLIAM C. CHANCE, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

Respondent, William C. Chance, files this brief in opposition to the granting of a writ of certiorari sought by the Atlantic Coast Line Railroad Company to the judgment of the United States Court of Appeals for the Fourth Circuit entered herein on January 27, 1951.

PRELIMINARY STATEMENT

The facts as set out in petitioner's "Summary Statement of the Matter Involved" are substantially correct.

reference to it was made, the implication is that it was approved, for in the *Morgan Case* this Court took especial pains to point out in a footnote

> "When passing upon a rule of a carrier that required segregation of an interstate passenger, this Court said 'and we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make'. *Chiles* v. *C. & O. R. Co.*".

So far as we are aware the first court to question the full and complete right of a railroad company to adopt such a rule and regulation as is here involved was the Circuit Court of Appeals for the Sixth Circuit in *Whiteside* v. *So. Bus Lines, Inc.*, 177 Fed. 2d 949, decided in 1949. There a bus company had such a regulation as is here involved and enforced it against an interstate colored passenger. That Court expressly said that if *Chiles* v. *C. & O. R. Co., supra,* were to be destroyed, "it may not be by us".

But it likewise held, among other things, that such a rule and regulation by a carrier had exactly the same effect as did a State statute, and that if a State statute was a "burden upon commerce", then a regulation of the carrier "enforced by it under the asserted sanction or compulsion of Kentucky law" was a burden on commerce and void.

In that case the Circuit Court said that the carrier defended its regulation not only upon the ground of local custom, but of applicable Kentucky law.

This is the case referred to and relied upon by the Court of Appeals for the Fourth Circuit in its opinion in the instant case. But here the Court of Appeals for the Fourth Circuit went a step further. The defense here is based *solely* upon the reasonable rule and regulation of the carrier, and

the Court held that that rule and regulation imposed a burden upon interstate commerce and hence was void.

We have this very highly anomalous situation. This Court has held that a State statute *requiring* such segregation and that a State statute *forbidding* such segregation are equally vicious. In each instance the statute is an attempt by the State Legislature to impose a direct burden upon commerce and to interfere directly with its freedom and encroaches upon the exclusive power of Congress and is, therefore, unconstitutional. The test is not whether segregation is required by the statute, or whether it is forbidden by the statute; but the test is whether the State is attempting to burden commerce and interfere with its freedom. Now the Court of Appeals for the Fourth Circuit has said that if by rule and regulation of a private person, to-wit, a railroad company, segregation is required, that rule and regulation is just as vicious as is a State statute which would require separation. Since the vice is not in the fact that separation is required, but is in the fact that an attempt to burden and interefere with commerce is being made, a rule, regulation or enforced practice prohibiting segregation would have the identical vice that is possessed by a State statute prohibiting segregation. How, may we ask, if this be sound law, are passengers of different races to be seated? To seat them together is illegal because it interferes with the exclusive powers of Congress to regulate; and to seat them separately is illegal because it interferes with the exclusive power of Congress to regulate. To state such a proposition is to answer it.

The fact of the matter is that this argument that such a rule of the carrier as is here involved is an attempt by it to accomplish the same result that would be accomplished by State legislation requiring separation, is to miss the point. It assumes that the separation of passengers on racial grounds has been held to be unlawful under any and under

all circumstances. Such has not been held. It is only where there is separation without equal accommodations that such separation is invalid, and then not because of the Commerce Clause of the Constitution, but because of the provisions of the 14th Amendment and those provisions of the Interstate Commerce Act which prohibit discrimination (see *Mitchell* v. *U. S.*, 313 U. S. 80—the Pullman car case,—and *Henderson* v. *U. S.*, 339 U. S. 816—the dining car case). It fails to recognize the distinction between action of a State in attempting to regulate the business of a carrier with respect to matters which under the Constitution are the sole concern of Congress, and the right of the carrier to operate its own business subject to such regulations, if any, as the Congress may have imposed. Many aspects of interstate transportation might be dealt with by Congress which have been left by it subject to the rules and practices of the carriers themselves. The fact that Congress has refrained from acting in a field exclusively entrusted to it, does not empower the States to step into that field, but it does permit the carriers by their rule and regulation to determine how they will operate within that field until Congress lays down the rule.

The view of the Court of Appeals also overlooks another factor. As was pointed out in *Hall* v. *DeCuir, supra,* a carrier must of necessity have the right to promulgate uniform regulations over its whole route or certainly large and substantial portions of it. Here the regulation is a regulation governing the whole of the Coast Line system, operating from Richmond, Va., down into Florida, and out into Alabama. The then Chief Justice pointed out the confusion that would arise should different and varying State legislative requirements be applicable.

We believe that the real error both in the *Whiteside Case* and in the decision of the Court of Appeals in the instant

case lies in a misuse of that oft-used expression "burden on commerce".

This Court was careful to point out in *Morgan* v. *Virginia, supra,* that "Burdens upon commerce are those *actions of the State* which directly impair the facilities of interstate traffic * * *." (Italics supplied.) We need not go into establishment of the fact that no cause so contributed to the holding of the Convention of 1787 as conflicting and hostile actions of the several States concerning matters of commerce between the States, and that indeed the Annapolis meeting of the year before, out of which the Constitutional Convention developed, had been called to search for means and methods of freeing the country from the confusion into which these restrictive and hostile regulations had thrown it. The exclusive power to regulate commerce given by the Constitution to the Congress arose by virtue of these conditions then prevailing in interstate commerce and in somewhat similar regulations in the field of foreign commerce. Hence, this Court has always recognized that the action which is referred to as a "burden on commerce" was State legislation. That declaration by this Court in *Morgan* v. *Virginia, supra,* was nothing new (see *Sherlock* v. *Alling,* 93 U. S. 99, by way of example). Indeed prior to the *Whiteside Case,* we have been able to find no indication that there can be such a thing as an unconstitutional "burden on commerce" *imposed by private parties,* and apart from Congressional legislation.

If there be within the provisions of our constitution anything which would warrant such a view, our courts have heretofore been blind to it. We need not cite the history which gave rise to the enactment of the Sherman Anti-Trust Law. Sufficient is it to say that Congress reached the conclusion that combinations and agreements in restraint of trade interfered with and burdened commerce and enacted

legislation placing such agreements outside the pale of law. Congress having acted, such combinations and agreements became invalid. This Court said in *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S. 211:

> "The power to regulate such commerce, that is, the power to prescribe rules by which it shall be governed, is vested in Congress and *when Congress has enacted a statute such as the one in question,* any agreement or combination which * * * thereby regulates interstate commerce to *that* extent, and to the *same* extent trenches upon the power of the national legislature and violates the statute." (Italics supplied.)

We submit that prior to the Sherman Anti-Trust Act such combinations and agreements as have since been held to be violative of that Act and illegal, could not have been held to be violative of any provision of the Federal Constitution. Some of them might have been illegal monopolies under state law, but as long as the Congress was silent they could not have been held to be "burdens on commerce" and violative of the Commerce Clause of the Federal Constitution. Congressional legislation was required—Congress had to exercise its power, and it had to declare such agreements to be illegal before they could be dealt with as Federal matters. This Court could not have supplied the designation of illegality because the power to regulate commerce rests in the Congress and not in Courts.

We cite one other pertinent example. It may be that prior to the adoption of the National Labor Relations Act a company might have adopted the policy of declining to deal with a Union representing a majority of its employees, or might have entered into an agreement with other companies that it would not deal with such a Union. Such a policy or an agreement would have been entirely different from State

legislation prohibiting employers from dealing with Unions. The latter might perhaps under the Commerce Clause have been held to be an interference with Commerce, but until Congress had declared itself and had adopted the National Labor Relations Act the former could not have been questioned in law.

It is the Congress which has the exclusive power to regulate commerce, and it is the function of the Courts to preserve that power and protect it from efforts by other governments to interfere therewith. But private parties conducting the commerce,—the carrier actually furnishing the facilities,—may adopt such reasonable rules as it sees fit until the Congress sees fit to lay down a national policy.

CONCLUSION

It is accordingly submitted that a writ of certiorari should be granted petitioner and that this Court should review the decision of the Court of Appeals for the Fourth Circuit and reverse the same and remand the case to it with the directions for which prayer is made in the accompanying petition.

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However, while it is true that the train upon which respondent was a passenger was operated by the Richmond, Fredericksburg & Potomac Railway Company with its locomotive and employees from Washington to Richmond, and by the petitioner railroad company from Richmond to Rocky Mount, North Carolina, the passengers, including respondent, who boarded the train in Washington were entitled to ride that train without transfer or interruption of their journey to their destination. So far as the passengers were concerned, it was one continuous journey from Washington to Rocky Mount and other points farther south. No interruption was made of the passenger's journey in Richmond other than the necessary delay while the locomotive and employees were being changed, except the additional delay, interruption, hindrance and discomfort occasioned by petitioner railroad company requiring all through passengers to be moved to another coach or another part of the train solely because of their race and color, even though such passengers were traveling in interstate commerce, when such passengers happened to be in a coach which was assigned by the rules and regulations of the company to passengers of another race. In this particular case, this respondent was first assigned to the coach in which he was riding by railroad employees and was later repeatedly requested to move to another coach by agents of petitioner solely because of his race.

The warrant under which respondent was arrested showed on its face that it was obtained and sworn to by the conductor, an employee of the railroad company, and, subsequently at his instance and request, it was dismissed.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 186 Fed (2d) 879 and set out on pages 179-186 of the record as stated in the petition.

JURISDICTION

The jurisdiction of this Court under Section 1254, paragraph (1) of Title 28, United States Code, is conceded.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

A.

The brief of respondent (appellant and cross-appellee in the Court of Appeals), which was filed herein in the United States Court of Appeals, is set out on pages 1-25 of the record in this Court. In both the District Court and United States Court of Appeals for the Fourth Circuit respondent contended that the rules and regulations of the carrier were invalid because (1) they constituted a burden on Interstate Commerce, (2) they violated the Fifth and Fourteenth Amendments to the Constitution, the public policy and laws of the United States, and (3) they were unreasonable. Respondent's brief in support of these contentions has been printed and set forth on pages 1-25 of the record of this case filed in this Court. The Court of Appeals only found it necessary to consider the first of these propositions. Respondent submits that the Court of Appeals was clearly right.

A common carrier under the law has a right to make and enforce such rules and regulations as are applicable alike to all members of the traveling public. An interstate traveler has the right and privilege of being treated as an individual subject only to such rules and regulations as are applicable to all other members of the traveling public. Any rule or regulation which violates this cardinal principal and subjects an interstate passenger to different treatment because of some arbitrary classification whether enacted and enforced pursuant to a state law or pursuant to some custom or practice constitutes a burden on interstate commerce.

B.

Petitioner relies solely upon its rules and regulations, and the reasonableness thereof, as grounds for the ejection of respondent. It disclaims any reliance upon state law. It therefore asserts that *Morgan* v. *Virginia*, 328 U. S. 373, and subsequent cases have no application. However, the record shows that petitioner has always relied upon the state authorities and its laws for enforcement of its rules and regulations. In this particular case, the agents of petitioner called police officers to meet the train when it arrived in Emporia. At its instance and request these police officers boarded the train and participated in the ejection of respondent. As a result of these actions, a warrant was procured for respondent's arrest and he was arrested and incarcerated. Petitioner now also attempts to disclaim responsibility for such arrest and detention.

This same disclaimer was made by the Southern Railway System in *Matthews* v. *Southern Railway System*,

157 Fed (2d) 609. In that case the United States Court of Appeals for the District of Columbia, in overruling such contention, stated, that

> "A common carrier is required to protect its passengers against assault and interference with the peaceful completion of their journey. But an exception to the general rule is that an agent of the carrier is not required to interfere with a known officer of the law apparently engaged in the performance of his duty. * * * But the exception goes no further. It does not cover the action of the agent in otherwise causing, procuring, assisting in, or participating in the arrest or ejection, or where the arrest is at the instance of the agent. In other words, there is a clear line between the action of an agent of a carrier in merely notifying the police of a violation of law or identifying persons at the request of a police officer, and his action in going beyond mere notification or identification and by some additional act procuring, causing, directing, or participating in an arrest or ejection. Liability in the latter cases rest upon joint tort-feasance or breach of contract, and not upon agency."

C.

In the three cases that have come before this Court in modern times the rule has been clearly enunciated that in interstate travel passengers on common carriers have a right to be treated as individuals, subject only to rules and regulations applicable to all of the traveling public, and such passengers are entitled to uniformity of traveling conditions. *Mitchell* v. *United States*, 313 U. S. 80; *Morgan* v. *Virginia*, 328 U. S. 373, and *Henderson* v. *United States*, 339 U. S. 816.

As was stated by Judge Soper in this case, in referring to the *Mitchell* and *Henderson* cases, "In the last mentioned cases the Court did not reach certain constitutional questions suggested by the complainant, but in all the cases, whether the decision was based upon a violation of a provision of the Constitution or of a statute of the United States, the problem under consideration was the standard of conduct to be observed by interstate carriers in dealing with members of the traveling public. Moreover, the ill effect upon the passengers and the disturbance of interstate traffic were much the same whether the carrier's conduct was treated technically as a denial of equal privileges to the races or as a burden upon interstate commerce." (Record, p. 184)

Thus, three United States Courts of Appeals—two of them unanimously, within the past two years—have recently held that actions of transportation companies, similar to those engaged in by the petitioner in this case, contravene the rights of colored citizens who were traveling upon common carriers in interstate commerce.

Chance v. *Atlantic Coast Line Railroad Company*, 186 Fed (2d) 879.

Whiteside v. *Southern Bus Lines, Inc.*, 177 Fed (2d) 949.

Matthews v. *Southern Railway System, supra.*

No Court has recently held to the contrary. No State or Federal law gives sanction to such actions. There is no important Federal question raised which has not already been clearly decided by unanimous holdings of various United States Courts of Appeals since the decision of this Court in *Morgan* v. *Virginia, supra.*

It is therefore respectfully submitted that the writ of certiorari should be denied.

Respectfully submitted,

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